83-2133

NO.

In The United States Supreme Court

October Term, 1984

J & S CONSTRUCTION COMPANY
Petitioner

vs.

THE HOME INSURANCE COMPANY
Respondent

Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Sixth Circuit Court of Appeals act properly by admitting evidence which was not in the record for the respondents when there was also evidence which would contradict the evidence used by the Sixth Circuit which the Sixth Circuit would not consider on a petition for a rehearing that would have aided petitioner.

II. Did the Sixth Circuit Court of Appeals act properly by finding that the evidence was insufficient to support the verdict of the lower court when:

(A) the finding of fact by the lower court expressly showed deceit and lack of credibility, and

(B) that a scheme had existed to defraud the petitioner.

PARTIES

The petitioner: J & S Construction Co. Inc.

The respondent: The Home Insurance Company

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the Sixth Circuit Court of Appeals filed December 14, 1983 is an unpublished and unsigned decision, however, this decision is reproduced in the appendix as appendix A.

The order of the Sixth Circuit Court of Appeals denying the petition for rehearing is reproduced in the appendix as appendix B.

JURISDICTION

This petition seeks to review a decision by a court of appeals and as such jurisdiction is conferred upon this court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. Federal Rules of Civil Procedure

Rule 52. Findings by the court.

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgement shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similiarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for finds are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.* The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any motion except as provided in Rule 41(b). (emphasis added)

(b) Amendment

Upon motion of a party made not later than 10 days after entry of judgement the court may amend its findings or make additional findings and may amend the judgement accordingly, the motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgement.

(As amended Dec. 27, 1946, effective Mar. 19, 1948; Jan. 21, 1963, effective July 1, 1963.)

STATEMENT OF THE CASE

The subject matter of this case is, simply, a bond and the circumstances under which it was filed. The controversy is whether the bond in question is a supersedeas bond, as was ordered to be filed by the trail court, or a cost bond which respondents had previously filed with the court as a separate instrument.

It is important at the outset that this court be made aware of the entire backgrounds of the dealings which led to filing of the bond in question and the manner in which the bond was treated even after it was filed. Petitioners list this entire proceeding so that this Court might have the full perspective that the trial court had when it rendered its decision for the petitioner.

J & S Construction Company Inc. were subcontractors of George Rush d/b/a Rush Engineers on a Corps of Engineers project at Salt Lick Creek Park in Jackson County, Tennessee. Rush obtained the services of The Home Insurance Company to post the performance bond and payment bond required by 40 U.S.C. § 270 (a), (b) of engineers and contractors working on U.S. Government contracts.

Rush breached his contract to J & S and J & S filed suit in the Chancery Court of Jackson County, Tennessee. Rush removed the case to The United States District court for the Middle District of Tennessee Northeastern Division showing diversity and amount in controversy.

After a series of delays, stays, extensions of time, failures to make available for discovery, etc. a judgement was entered for J & S in the amount of $106,676.93 plus interest on the judgement. (See appendix C). Rush then filed a notice of appeal.

As a condition of the appeal being granted, the Honorable Thomas A. Wiseman, United States

District Judge issued an *ORDER GRANTING STAY* conditioned upon defendant Rush filing "a surety bond in the sum of $225,000, conditioned in accordance with applicable law and approved by this court." (See appendix D) (Judge Wiseman heard this motion while Judge Morton was apparently unavailable to hear it.)

On January 16, 1979 an *AGREED ORDER GRANTING REDUCTION OF SUPERSEDEAS BOND* was approved by Judge Wiseman upon entry with consent of both J & S's and Rush's attorneys. This order was simply a good faith agreement on the part of J & S to reduce the bond from $225,000.00 to $106,676.93, plus interest on the judgement. Another condition was that execution by J & S be stayed until January 18, 1979 pending defendant Rush's filing the bond approved by Judge Wiseman with the consent of both parties attorneys. (See appendix E)

The bond which is the subject matter of this lawsuit was then filed on January 30, 1979. (See appendix F) Subsequent to the filing of the bond the clerk's office of the United States District Court in Nashville, Tennessee telephoned Mr. Harlan Dodson, III, J & S's attorney, and informed him that the supersedeas bond which had been required by Judge Wiseman and reduced with permission of Judge Wiseman and agreed consent of the parties had been filed. The civil docket continuation sheet listed, "1-30-79 Filed: Supersedeas Bond."

The appeal was taken to the Sixth Circuit Court of Appeals and the district court's judgement awarding J & S $106,000.00 plus interest was affirmed. (See appendix G) Here again, it is imperative to note that the only manner in which this appeal would have been allowable would have been by posting the bond that had been ordered by the court and entered as the bond ordered, by the clerk of the district court.

As shown on the order and issuance of the mandate from the Sixth Circuit Court of Appeals, this entry was made on December 22, 1980. This case, *J & S v.*

Rush, had been appealed to the Sixth Circuit in early 1979 pursuant to the posting of the bond ordered by the district court and filed on January 30, 1979.

After the appeal had been taken and was being considered by the Sixth Circuit, Mr. Albert E. Phillips, attorney for Home Insurance Company, mailed Mr. Harlan Dodson, III, attorney for J & S, a letter informing him that Home Insurance had been informed through a third party that J & S and J & S's attorney, Mr. Dodson, III, were incorrectly relying on the January 30, 1979 bond as being a supersedeas bond where it was, in their opinion, only a cost bond even though if a cost bond it would be the second one posted in this case.

Mr. Phillips letter to Mr. Dodson was dated April 30, 1980 and is reproduced in appendix H.

The instant case was filed August 25, 1982 by J & S against The Home Insurance Company in United States District Court for the Middle District of Tennessee Northeastern Division. The instant case sought to recover from The Home the amount of the judgement which petitioners contend that The Home had superseded pursuant to the order of the district court as a condition for the *J & S v. Rush* case being allowed to proceed on appeal.

The instant case was heard in the district court on November 12, 1982 and a verdict was entered for J & S. (See appendix I)

An appeal was taken by The Home and the Sixth Circuit reversed the district court and entered its on December 14, 1983. (See appendix A) A petition for rehearing was timely filed by J & S and was denied by the Sixth Circuit. (See appendix B)

REASONS FOR GRANTING CERTIORARI

I. THE APPELLATE COURT CONSIDERED EVIDENCE WHICH WAS NOT IN THE RECORD IN AN ATMOSPHERE WHICH PREJUDICED PETITIONER.

It is the petitioner's position that this court should grant certiorari to the Sixth Circuit to review this decision primarily for two reasons:

(1) The evidence presented to the district court was adequate for the court to render a decision that was *not* clearly erroneous.

(2) The Sixth Circuit considered matters that were not introduced into the record and recited these matters which were not in the record in its order reversing the district court. Additionally, the Sixth Circuit ignored other matters which were not introduced into the record which would have controverted the matters that the Sixth Circuit recited in its order.[1]

So the letter which the Sixth Circuit, *sua sponte,* incorporated into their decision was not even a letter from counsel of record. (See appendix J and L.) Additionally, if the Sixth Circuit was going to use this letter as evidence it should have, also, in equity and fairness have used the retraction letter of February 1, 1982 since it was on the same list and authored by the same person, although neither of the letters were properly before the court of appeals.

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1. The appellate court in its order of December 14, 1983 stated, "...Indeed, J & S's counsel admitted in a letter dated December 31, 1981 that the bond was a cost bond..." This letter of December 31, 1981 was never introduced into the record of the district court and was not, therefore, properly before the Court of Appeals.

The letter was, however, on a list of *STIPULATION AS TO EXHIBIT* and appears at entry No. 16. (Please note that this letter is not signed by Mr. Harlan Dodson, III, but rather by Mr. Harlan Dodson. Mr. Harlan Dodson, III was the attorney of record in *J & S Construction Company, Inc. v. The Home Insurance Company.* (See appendix J)

Also, appearing on the list entitled *STIPULATION AS TO EXHIBIT* is a letter from Mr. Harlan Dodson wherein he expressly denies that the statement was to be considered in the manner in which The Home's attorney had construed it. Mr. Harlan Dodson also expressly states in the letter of February 1, 1982, that he is "still" in Florida on "my winter vacation." The *STIPULATION AS TO EXHIBIT* is reproduced in the appendix at M.

Also, evidence of equal weight which the Sixth Circuit could have used but did not, and should have used if the letter from Mr. Harlan Dodson (not Mr. Harlan Dodson, III) was going to be used, was a statement in a letter dated April 3, 1980 from Mr. Albert E. Phillips acknowledging his representation of The Home and further stating: "I only have firsthand knowledge that Home wrote the cost bond in the case *but I assume Home also ultimately wrote the supercedeas bond.*" (emphasis added) This letter of April 3, 1980 was quoting Mr. Thomas J. Knight who was the attorney of record for Rush at the time the bond in question was posted. This letter, therefore, serves two purposes: it recognizes that the bond was posted as a supersedeas bond and imputes knowledge of this to counsel for The Home, (See appendix H) (It is important for this Court to note that Harlan Dodson and Harlan Dodson, III, are not the same individuals. Harlan Dodson, III was J & S's only counsel of record in the instant case.)

Petitioner respectfully submits that Mr. Harlan Dodson was never counsel of record in the instant case and anything authored by him is inappropriate to be used in the determination of this case. (See appendix J)

28 U.S.C. Federal Rules of Appellate Procedure Rule 10(a) states:

> "Rule 10 The Record on Appeal
> (a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries shall constitute the record on appeal in all cases."

Other circuits concur in the idea that matters not in the record as provided by Rule 10(a) should not be considered and if introduced at the appellate level will be censored. *See, e.g., Kemlon v. Products and Development Co. v. U.S.*, 646 F. 2d 223, (C.A. 5th 1981); *Neu v. Grant*, 548 F. 2d 281, (C.A. 10th 1977);

Rosen v. Lawson-Hemphill, Inc., 549 F. 2d 205, (C.A. 1st 1976); *Goldman v. Sears, Roebuck & Co.*, 607 F. 2d 1014, (C.A. 1st 1979) cert. denied 445 U.S. 929.

II. THE APPELLATE DID NOT HAVE SUFFICIENT EVIDENCE BEFORE IT TO FIND THE DECISION OF THE DISTRICT COURT "CLEARLY ERRONEOUS."

The findings of the trial court in the instant case are reproduced in the *appendix at I.*

The verbal findings of the trial judge at the conclusion of the hearing on November 12, 1982 are reproduced in the *appendix at N.*

It is evident from both the *MEMORANDUM* and the *FINDINGS OF THE COURT* that the trial judge found the credibility of the witnesses for the Home to be questionable. Other appellate courts and this court have, long past, determined that questions of credibility and their determinations by trial courts are not to be reversed unless these assessments are found to be "clearly erroneous." In *Palermo v. Warden, Green Haven State Prison*, 545 F. 2d 286, 289 (C.A. 2d 1976) the Second Circuit very appropriately stated:

> "Where findings relate to the design, motive and intent behind human actions, they especially depend upon the credibility assessments of witnesses by those who see and hear them. *United States v. Yellow Cab Co.*, 338 U.S. 341, 70 S. Ct. 177, 94 L. Ed. 150 (1949); *Caputo v. Henderson*, 541 F. 2d 949, 984 (C.A. 2d 1976); United States exrel. *Wissenfeld v. Wilkins, 281 F. 2d 707, 713 (C.A. 2d 1960). Thus, an appellate court, equipped with only a "cold" record is appropriately reluctant to reject the credibility evaluations of the district court.*" (emphasis supplied)

This case unquestionably pends upon a credibility evaluation of witnesses; their actions in testimony and their evasiveness and their actions prior to the trial of the instant case at the district court level. In making this credibility evaluation the district court

judge, the Honorable L. Clure Morton, had been dealing with these same parties in various capacities for a full four years previous to his decision in the instant case. Judge Morton had also observed them on several occasions not making themselves available for depositions. Judge Morton had also observed their stall tactics in their motions for extensions of time, stays, etc. in allowing The Home to successfully defeat J & S's potential claim under the Miller Act bond which The Home had signed as surety for Rush which ultimately led to the filing of this lawsuit.

Finding of fraud is a finding of fact and usually not set aside by appellate court except in most unusual circumstances. *Magnaleasing, Inc. v. Staten Island Mail*, 563 F. 2d 567 (C.A. 2d 1977); *U.S. v. Fernon*, 640 F. 2d 609 (C.A. 11th 1981).

This court, long ago, faced with a similar situation stated in *Labor Board v. Pittsburg S.S. Co.* 337 U.S. 656, 659, "The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact." It was also stated in this case at 659, "...that for triers of fact to totally reject an opposed view impeaches neither the impartially nor the propriety of their conclusions."

This is exactly what the district judge did in the instant case, however, he had the additional advantage of having dealt with these same parties on previous occasions. Judge Morton in finding that two cost bonds had been filed in the same case and that the "scheme existed to attempt to deprive J & S Construction Company of the security they should have had," and "that Home Insurance Company knew about the outstanding liability through their branch office in Birmingham," was totally within the bounds of reason to render his decision for J & S.

The questions upon which this case pends are questions of fact and not of law. If, as Judge Morton found, a scheme existed to deprive J & S of their security and since the credibility of the witnesses of

The Home were not believed by Judge Morton then there is no dispute that the findings were findings of fact. The Sixth Circuit in *Campbell v. Spectrum Automation Company,* 513 F. 2d 932, (1975) was faced with an assessment of credibility of witnesses and affirmed the findings of credibility of the district judge and affirmed the decision on the findings of the court below. Other circuits regard credibility assessments made by lower courts to be the controlling factor when the question is one of credibility. *cf. e.g. Sweeney v. Research Foundation of St. Univ. of N.Y.,* 711 F. 2d 1179 (C.A. 2d 1983); *F.T.C. v. Texaco, Inc.* 555 F. 2d 862 (C.A. D.C. 1977); *Morgan v. Freeman,* 713 F. 2d 118, (C.A. 5th 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman,* 593 F. 2d 129 (C.A. 8th 1979).

As the district judge's findings in the instant case indicate, the intent of the parties was to "deprive J & S Construction Company of the security they should have had." This unquestionably is an assessment of the intent of The Home. The Sixth Circuit grossly departed from the teachings of this court and from their own prior decisions regarding intent. In *Godley v. Kentucky Resources Corp.,* 640 F. 2d 831, 834, (C.A. 6th 1981) the court stated:

> "Defendants contend that the circumstances surrounding the execution of the deeds show that they were intended as security for a loan from Godley to defendant Rakes, the owner of Piedmont Land Sales, Inc. *The intent of the parties at the time of the transaction is a question of fact.* See *Poyner v. Lear Seigler, Inc.,* 542 F. 2d 955 (6th Cir. 1976), cert. denied, 430 U.S. 969, 97 S. Ct. 1653, 52 L. Ed. 2d 361 (1977). *This court will not set aside the district court's fact finding unless that finding is clearly erroneous.*" (emphasis supplied)

This court, recently, in *Pullman - Standard v. Swint,* 456 U.S. 273, 288 stated:

> "Treating issues of intent as factual matters for the trier of the fact is commonplace. In *Dayton*

> *Board of Education v. Brinkman*, 443 U.S. 526, 534, 61 L. Ed. 2d 720, 99 S. Ct. 2971 (1979), the principal question was whether the defendants had *intentionally* maintained a racially segregated school system at a specified time in the past.

We recognized that issue as essentially factual, subject to the clearly-erroneous rule." (emphasis supplied)

Pullman-Standard v. Swint, 456 U.S. 273, 282, also sheds additional light upon the instant case. Here, this court stated: "In reaching this conclusion, the Court of Appeals did not purport to be *correcting a legal error*, nor did it refer to or *expressly* apply the clearly - erroneous standard." (emphasis added)

The *exact* same situation is true in the instant case! The appellate court below did not purport to predicate its order on *correcting any legal error* nor did the appellate court *expressly* apply the clearly-erroneous standard. In fact the only time the clearly-erroneous standard is *expressly* stated in the order below is in the strong dissent of Circuit Judge, Jones expressly stating that the decision of the district court *was not* clearly-erroneous.

Judge Morton's finding that the January 30th bond was artfully worded to deceive is evident from the face of the bond. Logic cannot be abonded in making this assessment. Why would a surety bond for the court cost recite the name of the opposing party and the amount of the judgement from which the appeal is being taken? A surety bond for court cost should be made to the court and not to the opposing party to the lawsuit.

Further logical test should also be applied to the circumstances surrounding the posting of the bond in question. Why would a litigant post two bonds in the same case? (See appendix F and O) If these were *intended* for the same purpose then why is there such a gross discreptency in their wording? Why would a contractor who was able to post bond for a government job in excess of $1,000,000.00 go to the trouble

of petitioning a federal district court to lower a bond set at $225,000.00 to $106,000.00 if the contractor were only going to post a second $250.00 court cost surety bond? Why would a litigant go to the trouble of contacting an office in Birmingham, Alabama who then had to contact an office in New York to post a $250.00 bond in Tennessee for only a $20.00 bond fee? Why would this litigant, also "just happen" to contact the same company who was already, at that time, on his Miller Act bond to the same sub-contractor who had obtained the judgement which The Home's witnesses admittedly knew about? Why did The Home not produce all the witnesses of their company who executed this bond? There is always a presumption in a civil lawsuit when a witness who could clear a point is not asked to testify. What prompted this "third party" "phantom" phone call to The Home's attorney who then related to J & S's attorney that J & S was misplacedly relying upon an interpretation of a bond in the exact same comprehension as the trial court had ordered? Who made this notification to The Home? How did they, at that time, know that J & S was considering the January 30th bond a supersedeas bond? Why did The Home not produce the person who had allegedly made this revelation regarding J & S's interpretation of the bond?

CONCLUSIONS

Petitioners submit that the district court was justified in finding that a scheme existed to defraud J & S. The district judge had an overwhelming advantage in assessing the credibility, candor, demeanor, and intent of these parties since the instigation of the first lawsuit filed four years previously.

The district judges advantage in making the factual findings added to the artful wording of the bond and motive an intent of the parties justified the district judge's ruling for J & S. The fact that there was a dissent in the circuit court of appeals, also adds substance that the decision was not "clearly-erroneous" as it must be, of necessity, to overturn a finding of fact pursuant to Rule 52.

Petitioner comes to this Most Honorable Court with totally clean hands having been defrauded by a "scheme" of deceit. Petitioner request that this Court summarily reverse the decision of the appellate court or grant certiorari.

Respectfully Submitted
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APPENDIX

Filed Dec. 14, 1983
John P. Hehman, Clerk

Unpublished, Unsigned Opinion

No. 82-5727

United States Court Of Appeals
For The Sixth Circuit

J & S CONSTRUCTION COMPANY, INC.
Plaintiff-Appellee

v.

THE HOME INSURANCE CO.
Defendant-Appellant

On Appeal From The United States District Court
For The Middle District Of Tennessee

Decided and Filed December 14, 1983

BEFORE: MARTIN, KRUPANSKY, and JONES, Circuit Judges.

KRUPANSKY, Circuit Judge. J & S Construction, Inc. (J & S) initiated this diversity action against The Home Insurance Company (Home) for an amount allegedly due and owing on a bond. The United States District Court for the Middle District of Tennessee adjudged Home liable on the bond in an amount of $106,676, finding the bond to be a "supersedeas"

bond. On appeal, Home alleges that the bond was a "cost" bond binding Home in an amount not to exceed $250.00

The operative facts are undisputed. George Rush, d/b/a Rush Engineers, was the prime contractor for the Corps of Engineers in Jackson County, Tennessee. As such, Rush was mandated by the Miller Act, 40 U.S.C. §270a *et seq.*, to furnish a payment bond to insure payment to sub-contractors who supplied labor and/or materials for the federal project. 40 U.S.C. §270a (a) (2). In accordance with this Congressional mandate, Rush obtained a payment bond from Home.

J & S was retained as a sub-contractor by Rush but never received payment after discharging its contractual obligations. J & S then initiated a breach of contract action against Rush in the Chancery Court for Jackson County, Tennessee. Home was not joined as a defendant. Rush removed the action to the United States District Court for the Middle District of Tennessee. On February 14, 1978, a default judgement was entered against Rush in the amount of $106,676. On January 11, 1979, Rush filed a notice of appeal and posted a cost bond. That same day Rush moved the district court for a stay of judgement pending appeal. The following day the motion for a stay was granted by the district court, conditioned upon Rush's filing a surety bond in the amount of $225,000 by January 18, 1979, to be approved by the court. Upon motion by Rush, and with the consent of J & S, the court reduced the amount of the supersedeas bond previously required" to "$106,676, plus interest on the judgment, costs of appeal, and damages for delay as provided by applicable law." The supersedeas bond mandated by the Order of January 16 was not filed, as required, by January 18. However, on January 30, 1979, the following document was filed with the district court:

> KNOW ALL MEN BY THESE PRESENTS:
>
> That we, George R. Rush, d/b/a Rush Engineers, as principal, and The Home Insurance Company, as surety, are held and firmly

bound unto J & S Construction Company, Inc., its successors, and assigns, and that we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents as stated herein.

Signed and sealed this 22 day of January, 1979.

WHEREAS, on December 14, 1978 the United States District Court for the Middle District of Tennessee, Northeastern Division in a suit between J & S Construction Company, Inc., plaintiff and George R. Rush, d/b/a Rush Engineers, in the sum of One Hundred Six Thousand Six Hundred Seventy Six and 93/100 ($106,676.93) Dollars, plus interest and costs, and George R. Rush, d/b/a Rush Engineers has taken appeal to the United States Court of Appeals for the Sixth Circuit, to reverse judgement in the above suit and must file security in the amount of Two Hundred Fifty Dollars for costs on appeal.

NOW THEREFORE, the condition of this obligation is such, that if George R. Rush, d/b/a Rush Engineers shall prosecute his appeal to effect and shall pay all costs adjudicated against him in said amount of costs on appeal if the appeal is dismissed or the judgment affirmed, or such costs as the Court of Appeals may award against George R. Rush, d/b/a Rush Engineers, if judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

The district court clerk's office telephoned Harlan Dodson III (Dodson), J & S's counsel of record, and informed Dodson that the bond had been posted and the judgment superseded. Dodson accepted this representation and did not personally inspect the document.

The underlying action between Rush and J & S was then appealed to the Sixth Circuit. Although J & S possessed a possible cause of action against Home predicated upon the Miller Act payment bond, no such action was initiated within the one year period of

limitations.[1] During the pendency of the J & S/Rush appeal, the one year limitations period expired. Thereafter, by Order dated October 16, 1980, this Circuit affirmed the judgment of the district court. Rush, however, continued to refuse to render payment.

The instant diversity action was then initiated by J & S against Home on August 25, 1982. J & S sought $106,676 predicated upon (1) the payment bond which Home had issued to Rush under the Miller Act and (2) the "supersedeas" bond which had been posted in the J & S/Rush litigation. Home defended asserting (1) the one-year period of liability under the payment bond had expired and (2) the "supersedeas" bond was simply a "cost" bond binding Home to at most $250. Following an extensive stipulation of facts the case was tried to the court. Judgment was entered against Home for $106,676, predicated upon the "supersedeas" bond filed in the J & S/Rush litigation. The court's memorandum opinion further observed that the doctrine of promissory estoppel would serve to permit a cognizable Miller Act claim irrespective of the expiration of the limitations period. This appeal ensued.

Home's bond filed in the J & S/Rush litigation is, facially, a cost bond. Although the bond references the underlying judgment of $106,676, Home clearly limited its liability to $250 costs of appeal:

> [Rush] must file security in the amount of *Two Hundred Fifty Dollars for costs on appeal*, NOW THEREFORE, the condition of this obligation is such, that if George R. Rush d/b/a Rush Engineers shall prosecute his appeal to effect and shall pay all costs adjudicated against him in said *amount of costs on appeal* ...then this obligation to be void; otherwise to remain in full force and effect.

1. J & S last supplied labor or materials to the federal project on March 28, 1978. No action was initiated within the one year period required by 40 U.S.C. §270b(b).

(emphasis added). Under Tennessee law, this $250 cost bond cannot be "reformed" by a court absent a mutual mistake or fraud on the part of one party. *Rolane Sportswear, Inc. v. United States Fidelity & Guaranty Co.*, 407 F. 2d 1091 (6th Cir. 1969); *Bituminous Fire & Marine Insurance Co. v. Izzy Rosen's, Inc.*, 493 F. 2d 257 (6th Cir. 1974).

The district court found the bond to be "artfully drafted". However, Home submitted undisputed testimony at trial in support of the following: (1) Home received only a $20 premium for the bond, and would have required a much higher premium had the bond indeed been a supersedeas bond; (2) Home expressly rejected Rush's application for a supersedeas bond in Rush's absence of providing security and a substantial premium. Further, when Home learned through a third party that J & S considered the bond to be a supersedeas bond, it immediately informed J & S that the bond was a cost bond and requested prompt notification in the event that J & S envisioned the bond as a supersedeas bond. On the date of Home's clarification letter to J & S, April 3, 1980, the Sixth Circuit had not issued a decision in the underlying J & S/Rush litigation.[2] J & S failed to notify Home of its position until December 31, 1981, approximately 1.5 years after receiving Home's letter and one year after this Circuit's decision in the J & S/Rush litigation. Indeed, J & S's counsel admitted in a letter dated December 31, 1981, that the bond was a cost bond. In sum, there is no evidence that the bond was a supersedeas bond, that Home intended to issue a supersedeas bond, or that Home represented to J & S in any manner that the bond was a supersedeas bond.

---

2. Thus Home alerted J & S of its position in time for J & S to either seek a declaration in the district court as to the status of the bond and/or move the Sixth Circuit to dismiss the appeal predicated upon Rush's purported failure to file a supersedeas bond as required by the district court.

The evidence is insufficient to support a finding of fraud and deceit by Home so as to justify a reformation of the bond into a supersedeas bond. Rather, all direct evidence supports the proposition that the bond was drafted and was intended to serve as a cost bond.

As aforenoted, the district court observed that Home's conduct would serve to equitably toll the one-year limitations period available to J & S under the Miller Act to seek liability from Home on the payment bond. As the court's opinion concedes, the cause of action predicated upon the payment bond was not filed within the applicable limitations period. Since the evidence is insufficient to support a finding of fraud by Home, and since the district court predicated its determination to equitably toll the Miller Act period upon Home's deceitful conduct, J & S's cause under the Miller Act must axiomatically fail. Nor can J & S predicate an equitable tolling upon the district court's conduct, to-wit, the telephone representation by the district court clerk intimating that the judgment in the J & S/Rush litigation had been superseded. It is the responsibility of counsel of record, and not the court clerk, to examine the documents filed with the court and to determine their legal effect. *See e.g.: Fast, Inc. v. Schaner,* 181 F. 2d 937 (3d Cir. 1950). Further, any representation by the district court clerk relating to the underlying J & S/Rush litigation was totally unrelated to and in no manner frustrated or preclude J & S's timely filing of an action against Home predicated upon the Miller Act.

Accordingly, the judgment of the district court is REVERSED and this cause is REMANDED with instructions to DISMISS the complaint in its entirety.

JONES, Circuit Judge, dissenting.

The majority has conspicuously divorced the bond from the surrounding circumstances in which it was filed. The pertinent factual inquiries before the district court were the following: (1) whether Home knew that a supersedeas bond had been mandated in

the J & S/Rush litigation, (2) whether Home and Rush had drafted the bond in an "artful" manner so as to mislead J & S and the court into believing that the document represented a supersedeas bond *(i.e.,* the "intent" of the drafters), and (3) whether J & S justifiably relied on the misrepresentation, if any. These issues of knowledge, intent and reliance are obviously factually oriented and subject to the "clearly erroneous" standard of Rule 52, Fed. R. Civ. P.

The district court's implicit findings of fraud, misrepresentation and reliance are not clearly erroneous. The record supports the conclusion that the document was an "artfully drawn" cost bond filed by Home and Rush to defraud J & S. The obvious motive for this deceit was to provide J & S with a sense of false security and thus diminish the likelihood that J & S would file an action against Home on the payment bond issued under the Miller Act within the one-year statute of limitations. Conspicuously, *after* the limitations period passed, Home informed J & S by correspondence that the bond was considered by Home to be cost bond rather than a supersedeas bond. In a subsequent letter dated January 12, 1982, Home again asserted that the bond was a cost bond and further informed J & S that a Miller Act action upon the payment bond would be barred by the applicable one year period of limitations.

The importance of the following cannot be overemphasized: (1) Home was potentially liable to J & S on the Miller Act payment bond, (2) Rush had already filed an appellate cost bond, (3) the instant bond was filed immediately following the district court's stay of judgment predicated upon Rush's filing of a *supersedeas* bond in the amount of $106,676, and (4) the instrument was "artfully drawn", referencing the amount of the underlying judgment and not identified in a heading as a "Cost Bond".

Upon finding fraud, the district court was clearly authorized to reform the contract to the manner in which it was intended to operate, *i.e.,* as a supersedeas

bond. Clearly, J & S, Rush, Home and the district court in the J & S/Rush litigation envisioned the bond to operate as a supersedeas bond when it was filed in January of 1979, and thus the bond could be reformed to its intended function *at this time.* It is immaterial that J & S subsequently characterized the bond as a cost bond in a letter correspondence to Home.[3]

I would, therefore, AFFIRM the judgment of the district court for the rationale provided by that court's memorandum opinion.

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3. Indeed, J & S's "admission" that the bond was a cost bond in a letter dated December 31, 1981, was expressly retracted by correspondence dated February 1, 1982.

Filed February 27, 1984
John P. Hehman, Clerk

No. 82-5727

United States Court of Appeals
For The Sixth Circuit

J & S CONSTRUCTION CO., INC.
Plaintiff-Appellee,

v.

THE HOME INSURANCE CO.,
Defendant-Appellant

ORDER

BEFORE: MARTIN, KRUPANSKY and JONES, Circuit Judges.

Before the court is plaintiff-appellee's petition for a rehearing of the above-captioned case. The basis of the appellee's petition for rehearing is that this court improperly based its decision upon evidence not properly before the court. Specifically, the appellee alleges that the court relied upon three letters which were not admitted into evidence by the district court in support of its opinion. The appellee asserts that following the logical progression of the courts opinion it is apparent that the court relied heavily upon the evidence in rendering its ultimate decision.

A review of this court's opinion, however, does not support the appellee's conclusion. There was substantial evidence before the court to support the conclusion that the appellee was not entitled to relief even

without considering the alleged improper evidence. The court specifically noted that the bond filed in the J & S/Rush litigation was clearly a cost bond. Additionally, the court found that there was no evidence in support of the proposition that the bond was a supersedeas bond or that Home represented to J & S that the bond was a supersedeas bond. Any reference to the letter was merely cumulative and non-dispositive of the issues. Accordingly, the plaintiff-appellees petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Received For Entry 9:15 a.m.
December 12, 1978
Julia B. Cross, Clerk
By Linda Breece Deputy Clerk

United States District Court For The
Middle District Of Tennessee
Northeastern Division

No. 78-2010-NE-CV

GEORGE RUSH d/b/a RUSH ENGINEERS

vs.

J & S CONSTRUCTION COMPANY, INC.

MEMORANDUM

This case was heard by the court on July 18, 1978, on the matter of damages, judgment by default having been granted to plaintiff previously. The history of the case leading to the present hearing is as follows: On June 29, 1978, plaintiff filed a motion with the court to compel discovery and for sanctions. As noted in that motion, the case was set for trial on July 10, 1978. Pursuant to such motion and Rule 8 of the Local Rules of Court, the court entered an order granting plaintiff's motion and setting the date of July 7, 1978, as the date for default judgment if defendant did not comply with the court order. On Friday, July 7, 1978, plaintiff's attorney filed with the court an affidavit stating that defendant had made no attempt to cooperate in discovery despite plaintiff's attorney's offers to do so. The court found the defendant to be in default.

At the time the case was regularly set for hearing, July 10, 1978, the defendant argued to the court a series of three points raised in a document filed with the court entitled "Objections to Order Granting Default Judgment and Taxing Costs Against Defendant." At the hearing of July 10, the defendant presented no witnesses, made no tender of compliance, and admitted that plaintiff's attorney had made a written offer to cooperate. Defendant further admitted that between the entry of the order of June 30, 1978, and the time of the hearing the defendant failed to tender the witnesses for discovery and the materials requested. Thereupon this court found that no attempt had been made to comply with either the plaintiff's reasonable request for discovery, or the court's order of June 30, 1978. The court concluded that the default was proper. The hearing for assessment of damages was set for July 18, 1978. This court subsequently entered an order dated July 24, 1978, granting the default. It appears that such order, due to its date of preparation, showed that the damages hearing was set for July 10, 1978, but, in fact, such was set for and held on July 18, 1978.

The plaintiff seeks recovery of:

(1) the balance due pursuant to the payment provisions of the contract;

(2) interest thereon;

(3) damages due to performance delay allegedly caused by defendant's default; and

(4) cost of the aborted efforts to effect discovery.

On or about July 26, 1976, the plaintiff and defendant entered into a subcontract for work to be performed by plaintiff on a United States Corps of Engineers job in Jackson County, Tennessee. The printed portion of the subcontract provided for retainage of 10% of the installment payments until the job was completed, accepted and the total contract price was paid by the owner to the principal contractor, the defendant herein. However, prior to the execution of the subcontract plaintiff inserted therein the phrase "Upon completion and acceptance of items 25,

26, 30-52 and 56 all retainage held on these items shall be released within thirty days." The court finds that the subcontract as amended was accepted by defendant and became the contract between these parties. The defendant refused to pay the retainage as provided by contract.

The court finds that the balance due on the contract, after two credits were given is $80,928.34. No question is raised as to the credit for seeding in the amount of $1295.36. However, the defendant contends it is entitled to a credit of $9,020.00 for the laying of lateral water lines instead of the given credit of $3,319.05. This issue the court finds against the defendant. The credible proof was clear that the reasonable cost and value for such item was $3,319.05. The plaintiffs did not agree to pay more than the reasonable value of such work. The contract price for such work was the amount credited. The defendant will not be permitted ex parte to charge more than the reasonable cost for such item of work, even though defendant may have unilaterally incurred additional cost therefore.

The total amount due under the subcontract by the terms became delinquent on September 25, 1977. This amount was liquidated and not disputed on reasonable grounds. Therefore plaintiff shall recover interest at the rate of 6% on the amount of $80,928.34 from September 25, 1977, to the date of the entry of this memorandum. *United States for the use of E & R Construction Co., Inc. v. Guy H. James Construction Co.*, 390 F. Supp. 1193, *aff'd.* 489 F. 2d 756 (6th Cir. 1972).

Plaintiffs seek the recovery of delay damages. Included in the claim is the cost of rental for an American backhoe and a Case backhoe. Once placed on the job it was not reasonably practical to remove this equipment. The delay caused by the failure of the defendant to comply with its contract to provide graded roads within the time frame of plaintiff's performance resulted in plaintiff incurring additional rental cost in the amount of $14,272.00. This amount is due plaintiff. Plaintiff likewise seeks recovery of overhead allocated to the job due to the defendant's default.

The court is not satisfied that plaintiff has carried the burden of proof as to its method of computing this item. Therefore recovery for such is denied. However, plaintiff did carry its burden as to the item of extra travel and labor expense. A recovery will be allowed for this item in the amount of $3,214.69.

The last category of expense arises by virtue of the failure of defendant to comply with the local rules of this court and a direct order of the court. On two occasions defendant's representatives failed to appear for discovery deposition. In addition, defendant failed to provide documents ordered to be produced. The total amount sought is $3,592.04. Included are an hourly rate for plaintiff's personnel, mileage, telephone calls and parking fees. Absent the defendant's default, one-half of this time would have been necessary in ordinary trial preparation. Thus only $1,625.00 is allowable for the item of lost time. Likewise the item of mileage is reduced to $25.50. There will be no recovery for secretarial time and telephone calls since plaintiff's attorney expended unnecessary time due to the wilful failure of defendant to comply with the order of the court. The time claimed was twenty-four hours at $60.00 per hour. This hourly rate is reasonable. Applying the reasoning applicable to the loss of time by plaintiff's personnel, *supra*, the court allows a recovery of $720.00 as attorney fees. The total recovery in this category of expenses is $2,370.00.

Thus the plaintiff shall receive:

(1) The balance due on the contract of $80,928.34,

(2) interest at the rate of 6% from September 27, 1977,

(3) delay expenses of $14,272.00,

(4) extra travel and labor expense of $3,214.69, and

(5) aborted discovery costs of $2,370.00.

The attorney for plaintiff will submit a judgment for entry.

L. Clure Morton
Chief Judge

Received for Entry 12:30 p.m.
January 12, 1979
Julia B. Cross, Clerk
By L. Breece, Deputy Clerk

United States District Court For The
Middle District Of Tennessee
Northeastern Division

Case No. 78 2010 NE CV

J & S CONSTRUCTION COMPANY, INC.
Plaintiff

vs.

GEORGE R. RUSH, d/b/a
RUSH ENGINEERS
Defendant

ORDER GRANTING STAY

This cause came on to be heard on motion of defendant for a stay pending defendant's appeal to the United States Court of Appeals for the Sixth Circuit, and it appearing to the Court that defendant is entitled to such a stay, it is

ORDERED that the execution of, and any proceedings to enforce, the judgment entered herein on December 14, 1978, be stayed pending the determination of defendant's appeal from such judgment, provided that defendant file on or before January 18, 1979 a surety bond in the sum of $225,000. conditioned in accordance with applicable law and approved by this court.

DATED: January 12, 1979.

Thomas A. Wiseman, Jr.
United States District Judge

Received For Entry 3:10 p.m.
Julia B. Cross, Clerk
By L. Breece, Deputy Clerk

United States District Court For The
Middle District Of Tennessee
Northeastern Division

Case No. 78 2010 NE CV

J & S CONSTRUCTION COMPANY, INC.
Plaintiff

vs.

GEORGE R. RUSH, d/b/a
RUSH ENGINEERS,
Defendant

AGREED ORDER GRANTING REDUCTION OF SUPERSEDEAS BOND

This cause came on to be heard on motion of defendant for the reduction of the amount of supersedeas bond previously required by the Court in this cause, and that the plaintiff in this cause has agreed that the amount of supersedeas bond previously required by the Court be reduced, and it appearing to the Court that defendant's motion should be granted, it is

ORDERED that the execution of, and any proceedings to enforce, the judgment entered herein on December 14, 1978, be stayed pending the determination of defendant's appeal from such judgment, provided that defendant file on or before January 18, 1979, a bond in the sum of $106,676.93, plus interest

on the judgment, costs of appeal, and damages for delay as provided by applicable law.

Dated January 16, 1979.

Thomas A. Wiseman, Jr.
United States District Judge

Enter by Consent:
Harlan Dodson, III, Esq.
J. Murray Milliken, Esq.

Filed Jan. 30, 1979
By L. Breece Clerk

United States District Court For The
Middle District Of Tennessee
Northeastern Division

Case No. 78 2010 NE CV

J & S CONSTRUCTION COMPANY, INC.
Plaintiff

vs.

GEORGE R. RUSH, d/b/a
RUSH ENGINEERS
Defendants

KNOW ALL MEN BY THESE PRESENTS:

That we, George R. Rush, d/b/a Rush Engineers, as principal, and The Home Insurance Company, as surety, are held and firmly bound unto J & S Construction Company, Inc., its successors and assigns, and that we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents as stated herein.

Signed and sealed this 22nd day of January, 1979.

WHEREAS, on December 14, 1978 the United States District Court for the Middle District of Tennessee, Northeastern Division in a suit between J & S Construction Company, Inc., plaintiff and George R. Rush, d/b/a Rush Engineers, defendant, entered a judgment against George R. Rush, d/b/a Rush Engineers, in the sum of One Hundred Six Thousand Six Hundred Seventy Six and 93/100 ($106,676.93) Dollars, plus interest and costs, and George R. Rush, d/b/a Rush Engineers has taken appeal to the United

States Court of Appeals for the Sixth Circuit, to reverse judgment in the above suit and must file security in the amount of Two Hundred Fifty Dollars for costs on appeal,

NOW THEREFORE, the condition of this obligation is such, that if George R. Rush d/b/a Rush Engineers shall prosecute his appeal to effect and shall pay all costs adjudicated against him in said amount of costs on appeal if the appeal is dismissed or the judgment affirmed, or such costs as the Court of Appeals may award against George R. Rush, d/b/a Rush Engineers, if judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

George Rush d/b/a Rush Engineers, Principal
The Home Insurance Company
By John F. Ward, Attorney-in-fact

Filed Oct. 16, 1980
John P. Hehman, Clerk

No. 79-1092
United States Court Of Appeals

J & S CONSTRUCTION COMPANY, INC.
Plaintiff-Appellee

v.

GEORGE R. RUSH, d/b/a RUSH ENGINEERS
Defendant-Appellant

ORDER

BEFORE: WEICK, LIVELY and BROWN, Circuit Judges.

The defendant in this diversity action for breach of contract appeals from an order of the district court granting a default judgment to the plaintiff and a judgment for damages which was entered after a hearing. The defendant-appellant asserts that some sanctions might have been justified for its failure to produce witnesses for deposition, but that the record in this case does not support the extreme sanction of a default judgment.

Upon consideration of the entire record on appeal together with the briefs and oral arguments of counsel, the court concludes that the district court did not abuse its discretion when it granted a default judgment. Though the case had been set for trial for approximately three months, all efforts by the plaintiff to take the deposition of defendant and his employees had been futile. The motion of the plaintiff, filed eleven days before the trial date, was for an order requiring the defendant to produce the witnesses and records previously requested during

the following week, requiring counsel for the defendant to meet with counsel for the plaintiff to draw up a pretrial order and an allowance of fees and expenses for those times when witnesses had failed to attend noticed or agreed depositions. The motion of the plaintiff sought the default judgment only in the event the defendant failed to comply. The trial court granted the motion and stated in an endorsement thereon, "Default judgment will be entered as of July 7, 1978." The default judgment was actually entered on July 7, eight days after the motion of the plaintiff was granted, at which time the defendant had still not produced the witnesses for deposition. Under these circumstances the district court was justified in entering default judgment and we find no error in the computation of damages.

Accordingly, the judgment of the district court is affirmed.

Entered by Order of the Court
John P. Hehman, Clerk

Issued as Mandate: Dec. 22, 1980
Costs: None

PHILLIPS, HART & MOZLEY
ATTORNEYS AT LAW
1200 Peachtree Center Harris Tower
233 Peachtree St. N.E.
Atlanta, Georgia 30303
(404) 522-2010

April 3, 1980

Harlan Dodson, III, Esquire
900 Nashville City Bank Building
Nashville, Tennessee 37219

Re:
J & S Construction Company, Inc. v. George R. Rush d/b/a Rush Engineers; Case Number 79-1092 in the United States Court of Appeals for the Sixth Circuit.

Dear Mr. Dodson:

This will confirm our telephone conversation of this date.

This firm represents The Home Insurance Company. On March 24, 1980, this office received a letter from Attorney Thomas J. Knight, representing George S. Rush, in which letter Mr. Knight referred to the above-referenced litigation and stated, "In this case Rush requested that Home issue a supersedeas bond in regard to a judgment on a Home bonded project in Tennessee through a Tennessee agent. I only have firsthand knowledge that Home wrote the cost bond in the case but I assume Home also ultimately wrote the supersedeas bond."

This letter from Attorney Knight confirmed the substance of a telephone call from Attorney Knight to the undersigned on Friday, March 21, 1980. This telephone call appears to be the first knowledge had by representatives of The Home Insurance Company

that anyone might possibly contend that it had executed and issued a supersedeas bond in connection with the above-referenced case.

Upon receipt of Attorney Knight's said letter, I inquired of my client in New York as to the existence of any such supersedeas bond. I have been informed by The Home Insurance Company that, according to its records, it issued a $250.00 cost bond in connection with this appeal, receiving a $20.00 premium therefor. However, it has no record of having ever issued a supersedeas bond.

Consequently, in an effort to assure itself that no such supersedeas bond had been issued, a review of the record on appeal in the United States Court of Appeals for the Sixth Circuit was made on Wednesday, April 2, 1980. While the record on appeal contained references to a proposed supersedeas bond, no such supersedeas bond was located in that record.

On Thursday, April 3, 1980, the undersigned called the Clerk's Office at the United States District Court for the Middle District of Tennessee in Nashville and inquired as to whether its records in this case reflected the filing of any supersedeas bond. The lady with whom I spoke stated that the Court's docket reflects the filing of a supersedeas bond on January 30, 1979. She then read to me the substance of the bond instrument that was apparently filed with the Court on that date. The contents of the bond which were read to me by the Clerk's Office were those of a $250.00 cost bond and not of a supersedeas bond.

Therefore, The Home Insurance Company hereby puts your client J & S Construction Company, Inc. on notice of the following:

(a) According to its records, it has issued no supersedeas bond, as surety, in connection with the above-referenced appeal;

(b) It did issue a cost bond for $250.00 in connection with the above-referenced appeal and, according to its records, received a premium in the amount of $20.00 therefor;

(c) It has no knowledge as to whether a supersedeas bond was in fact written in connection with the above-referenced appeal by any other party or parties;

(d) It is the position of The Home Insurance Company that the bond instrument presently on file with the Clerk's Office in the United States District Court in Nashville, which bond instrument was read to the undersigned on this date, constitutes a $250.00 cost bond and not a supersedeas bond in connection with the above-referenced appeal.

In the event that you or your client are aware of the existence of any bond instrument purporting to be a supersedeas bond issued by The Home Insurance Company other than that instrument read to the undersigned by the Clerk's Office as described hereinabove, or in the event that J & S Construction Company, Inc. contends that said bond instrument read to the undersigned by the Clerk's Office as described hereinabove constitutes a supersedeas bond in connection with the above-referenced appeal, it is requested that you notify The Home Insurance Company and the undersigned, in writing, at your earliest convenience.

Should you have any question concerning any of the foregoing, please advise.

With kind regards.

Very truly yours,
Phillips, Hart & Mozley
Albert E. Phillips

AEP/mla

bc: John N. Summers
Thomas J. Knight

bps: Thomas J. Knight

Tim:

I will let you know in the event that I receive any response from Attorney Dodson.

AEP

Received For Entry 4:30 p.m.
Nov. 16, 1982
Julia B. Cross, Clerk
By: J. Murdic, Deputy Clerk

In The United States District Court For The
Northeastern District Of Tennessee
At Cookeville

No. 82-2082

J & S CONSTRUCTION COMPANY, INC.
Plaintiff

vs.

THE HOME INSURANCE COMPANY,
Defendant

PROPOSED MEMORANDUM

This matter came before the Court sitting without a jury for trial on the merits on November 12, 1982.

The parties had by stipulation and pretrial order resolved many of the underlying factual questions.

George R. Rush, d/b/a Rush Engineers of Anniston, Alabama (Rush), was the contractor on a project for the Corps of Engineers in Jackson County, Tennessee. The contract date on this contract was June 14, 1976.

The Home Insurance Company, defendant herein, issued a performance bond and a payment bond on the above contract under date of June 14, 1976. On or about June 16, 1976, a sub-contract was entered into between Rush and J & S Construction Company, Inc., (J & S) plaintiff herein. Pursuant to the sub-contract, J & S was to perform a portion of the work on the Rush job above described.

Subsequently, a dispute arose between J & S and Rush which resulted in a lawsuit being filed in the Chancery Court for Jackson County, Tennessee on December 29, 1977 with J & S Construction Company as plaintiff and Rush, as defendant.

Subsequently, under date of February 23, 1978, the Jackson County lawsuit was removed to Federal Court by Rush.

Upon Rush's failure to comply with discovery and with the orders of this Court, judgment was entered by default. After a hearing upon damages, this Court filed a Memorandum Opinion under date of December 12, 1978. Pursuant to this Memorandum Opinion, a judgment was entered on December 14, 1978 against Rush in the amount of $106,676.93.

On January 11, 1979, Rush filed a notice of appeal to the Sixth Circuit Court of Appeals and a cost bond for such appeal as required by law. On the same date, Rush filed a motion for stay pending the appeal. On January 12, 1979, an Order was entered by Judge Wiseman providing that any proceedings to enforce the judgment would be stayed pending the appeal provided that Rush file a supersedeas bond in the amount of $225,000.00.

During this period of time, Murray Milliken, the attorney for Rush, and Harlan Dodson III, the attorney for J & S, were discussing the appeal and the desire of Rush to have a specific bond amount set for a supersedeas bond so that Rush could file a bond staying enforcement pending the appeal. Subsequently, a motion to reduce the supersedeas bond was filed and an Agreed Order entered providing that the execution of, and any proceedings to enforce, the judgment would be stayed pending the determination of Rush's appeal provided that Rush file a bond in the sum of $106,676.93, plus interest on the judgment, costs of the appeal, and damages for delay as provided by applicable law.

At this point, the complication occurred upon which the defendant attempts to rely in this case.

On January 30, 1979, a bond (the January 30 bond) was filed with this Court showing George R. Rush, d/b/a Rush Engineers as principal and the Home Insurance Company as surety. The District Court Clerk's Office entered this as the supersedeas bond and noted on the official docket sheet the filing of the supersedeas bond. Promptly the District Court Clerk's Office called Harlan Dodson III, the attorney for J & S, and informed him that the bond had been made and the judgment superseded. During the course of that call, Mr. Dodson determined that the bond did secure the entire amount of the judgment with interest and that the surety was the Home Insurance Company.

Prior to the filing of the January 30 bond, plaintiff J & S was prepared to proceed to collect the amounts in question from the Home Insurance Company as the original surety for the contractor, Rush, on the construction job. The parties in the instant case stipulated that the last day of work for J & S on the Rush job was March 28, 1978. Thus, in January of 1979, J & S was well within the time to claim under the payment bond against the Home Insurance Company and to proceed thus to collect its judgment. As both Mr. Stites, the witness from J & S, and Mr. Dodson, the attorney for J & S, testified, it was only the filing of the bond of January 30, 1979 and the notification from the Clerk's office that the judgment had been superseded that prevented them from proceeding at that time against the Home Insurance Company on the original payment bond.

The January 30, 1979 bond, as actually filed, was an artfully drawn document. The bond is in every way a supersedeas bond except that upon a very careful reading, the bond is worded to secure only the payment of the same costs already bonded by Rush. Thus, purportedly, Rush filed two cost bonds, the second of which was superfluous, and the second of which would appear to any reasonable person simply examining it, as did the Clerk's office, to be a supersedeas bond of the judgment.

The January 30 bond was obviously filed as a supersedeas bond. There is no possible rationale for the defendant filing a second cost bond. There is no legal requirement for such and no logical requirement for such. The law is well established that a supersedeas bond may not, by artful draftmanship, avoid the very obligation to which it is intended. Such a bond, when approved by the Court, as such a bond must be, incorporates the decree or judgment under which it is filed. This must be law because otherwise parties would rely to their detriment upon Court action in staying the enforcement of a judgment.

The plaintiff, J & S, relying upon the supersedeas bond took no further action to enforce its claim under the contractor's bond against Home Insurance Company until after the one-year statute of limitations had run. Home Insurance Company now attempts to avoid liability by saying that the purported supersedeas bond was not such and so it has no liability under that and likewise has no liability under the payment bond to the contractor since time for suit has elapsed.

There is ample authority for a court to hold that the defendant is precluded from asserting the statue of limitations under a payment bond such as was issued in this case. The general law on such bonds in commonly known as the "Miller Act", 40 U.S.C. 270 (a-e). The Court would find that the defendant, Home Insurance Company, is so precluded from asserting the statute of limitations found in 40 U.S.C. 270(b) and allow J & S to recover under the initial payment bond. However, in view of the Court's conclusions herein, such action is unnecessary.

After hearing all of the proof at trial, the Court finds that the January 30, 1979 bond was filed as a supersedeas bond. The Court further finds that a scheme existed to attempt to deprive J & S Construction Company of the security it should have had. The Court finds that Home Insurance Company knew about the outstanding liability through its branch of-

fice in Birmingham. Home Insurance Company was aware of the payment bond on the contract and was aware of the judgment against Rush and was further aware that but for some form of supersedeas, J & S could have proceeded against Home Insurance Company in January of 1979 on the payment bond issued by Home Insurance Company on the Rush job.

The testimony of the witness Wood introduced by Home Insurance Company was revealing. Wood is an employee of an independent insurance agency in Birmingham, Alabama. Under a power of attorney from the Home Insurance Company, he had executed the original payment bond on the job for Rush. He also executed the January 30 bond on behalf of the Home Insurance Company. Although he was apparently put on the stand to establish that the January 30 bond was a cost bond, his testimony was consistent with the opposite conclusion. He testified that the bond was a cost bond and that the only premium received was that appropriate for a cost bond. However, he also indicated that he was aware of the payment bond issued on the job by Home Insurance Co. for Rush, was aware that the $106,000.00 judgment obtained by J & S against Rush was on the very job bonded by Home Insurance Company, and that presumably, the judgment would be an obligation covered by such bond. He also acknowledged his responsibility to pass on to the Home Insurance Company any knowledge that he had concerning the material changes in the financial condition of a bonded contractor. Mr. Woods testimony appeared to be carefully stated to make each statement he made truthful but to avoid really saying what the truth was. It is simply inconceivable that an experienced insurance agent such as Mr. Wood would casually write upon the credit of the Home Insurance Company a $250.00 cost bond on an appeal from a $106,000.00 judgment subject to a payment bond with the Home Insurance Company, without believing that a supersedeas was being entered. Thus, the testimony of this witness, though creditable, as far as it goes, is instructive by its omis-

sions and is more consistent with the position of the plaintiff than the defendant.

The testimony of the final witness, Mr. Seastedt, is of no aid to the defendant. Mr. Seastedt was employed by the Home Insurance Company at the time in question. From an observation of the witness on the stand, his demeanor and appearance in answering questions, and the types of and tone of responses obtained, the Court discounts entirely his testimony as to what happened. The Court simply does not believe based upon the testimony that the story is true. From Mr. Seastedt's testimony, it is evident that Home Insurance Company was aware of the $106,000.00 judgment against Rush and that the Home Insurance Company was aware that presumably J & S could immediately proceed to recover such amount from the Home Insurance Company unless a supersedeas of some type was entered. His testimony that with such knowledge the Home casually refused to make a supersedeas bond for the contractor absent stringent conditions and otherwise appeared to be unconcerned about the situation is frankly incredible. The lack of action by Home after being fully aware of the fact of the judgment and the fact that it was an obligation subject to the payment bond previously issued by Home is consistent only with the belief that the Court and the plaintiff has been convinced that the supersedeas bond was in effect.

For the foregoing reasons, the Court finds and concludes that the bond of January 30, 1979 was a supersedeas bond creating a liability in the Home Insurance Company to J & S Construction Company, Inc. in the amount of $106,676.93 plus interest on the judgment, costs on appeal and damages for delay from and after January 30, 1979.

L. Clure Morton
United States District Judge

Received for Entry 4:30 p.m.
Nov. 16, 1982
Julia B. Cross, Clerk
By J. Mendu, Deputy Clerk

In The United States District Court For The
Middle District Of Tennessee
At Cookeville

No. 82-2082

J & S CONSTRUCTION COMPANY, INC.
Plaintiff

vs.

THE HOME INSURANCE COMPANY
Defendant

JUDGMENT

For the reasons as set forth in the memorandum contemporaneously filed, the Court hereby enters a judgment in favor of J & S Construction Company, Inc. against The Home Insurance Company, in the amount of $106,676.93 plus interest through November 16, 1982 in the amount of $35,645.45 for a total judgment of $142,322.38.

Further, the costs of the appeal in the case of J & S Construction Company vs. George R. Rush, and the costs of this cause are adjudged against The Home Insurance Company.

L. Clure Morton
United States District Judge

Filed Aug. 25, 1982
Julia B. Cross, Clerk
By S. Tipton, Deputy Clerk

United States District Court
For The Middle District Of Tennessee
Northeastern Division

Case No. 82-2082

J & S CONSTRUCTION COMPANY, INC.
Plaintiff

vs.

THE HOME INSURANCE COMPANY
Defendant

NOTICE OF APPEARANCE

I, the undersigned, hereby file my notice of appearance as attorney for J & S CONSTRUCTION COMPANY, INC.

Harlan Dodson, III
900 Nashville City Bank Bldg., P.O. Box 252
Nashville, Tennessee 37219
615/244-6840

Harlan Dodson, III
*Trial Attorney

Dated August 25, 1982

*Request is made for the trial attorney for the purpose of avoiding conflicts, is possible, in scheduling.

Law Offices
Dodson, Harris, Robinson & Aden
900 Nashville City Bank Building
P.O. Box 2524
Nashville, Tennessee 37219

February 1, 1982

Lynn M. Schubert, Esquire
Phillips, Hart & Mozley
Attorneys at Law
1200 Peachtree Center Harris Tower
233 Peachtree St., N.E.
Atlanta, Georgia 30303

RE:
Contract No.: DACW62-76-C-0190
HOME BOND NO.: NB-698400
CLAIMANT: J & S CONSTRUCTION CO.

Dear Mr. Schubert:

Your letter of January 12, 1982, with reference to the above-captioned matter was forwarded to me by my secretary while I was in Florida, where I still remain on my winter vacation. For that reason, I request that she sign this letter for me. I do not believe that I have agreed that the only bond issued by the Home Insurance Company after judgment was a cost bond in the amount of $250.00. I agreed that for the purpose of the letter I was writing to Home Insurance Company at that time I was concerning myself with the performance bond and not with the cost bond, which is noted on the Clerk's docket sheet as being a judgment bond and which was required to be a judgment bond under the judgment of the Court. Only on this basis was an appeal allowable.

I am not familiar with the cases to which you refer and since I am not in my office but on vacation, will have to await my return to examine them. I did not

try this case and was not familiar with it until I cursorily examined the file and the performance bond issued by Home Insurance Company before writing my letter of December 31, 1981. The first paragraph of the second page of your letter is quite uncalled for. In 43 years, I have never brought a suit that I did not think had substantial merit and the same will be true in this case.

Very truly yours,
Harlan Dodson (By: NGC)
Harlan Dodson

HD/ngc
cc: George G. McCarthy, Jr., Esquire

Law Offices
DODSON, HARRIS, ROBINSON & ADEN
900 Nashville City Bank Building
P.O. Box 2524
Nashville, Tennessee 37219

Received Jan. 6, 1982
Bonding Claim Division

December 31, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Home Insurance Company
Manchester, New Hampshire

RE:
PERFORMANCE BOND FOR RUSH ENGINEERS
P.O. DRAWER 1108, ANNISTON, ALABAMA
36201
DATE OF BOND: JUNE 14, 1976
CONTRACT DATE: JUNE 14, 1976
CONTRACT NO.: DACW62-76-C-0190

Gentlemen:

We represent, as you know, J & S Construction Company, Inc. As you have previously been advised, Rush Engineers did not pay our clients, J & S Construction Company, Inc., for the full amount of the work done on the above-captioned contract. This matter was in litigation in the United States District Court for the Middle District of Tennessee at Nashville where a judgment was obtained by our clients against Rush Engineers in the amount of $106,676.93. Post-judgment interest from December 14, 1978 to May 1, 1979 was at 6%; from May 1, 1979 to July 1, 1981 was at 8%; and to date of payment

from July 1, 1981 at 10%. An appeal was taken wherein it was recited that there would be a supercedeas bond issued by Home Insurance Company. *We find only a cost bond was actually placed there,* but we deem this at the moment to be immaterial since under your Performance Bond issued to Rush Engineers as principal, you are responsible for the payment to our clients who supplied labor and material for the work provided for under the payment bond.

We would appreciate your immediate advice as to whether we may expect payment under this bond or whether it will be necessary that we file suit, in which event, of course, we expect to allege bad faith. Enclosed you will find a copy of the Judgment.

If anything further is needed from this office, please advise.

Very truly yours,
Harlan Dodson

HD/ngc

Enclosure

cc:
Mr. Johnny Stites
J & S Construction Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 82-2082

J & S CONSTRUCTION COMPANY, INC.
Plaintiff

v.

THE HOME INSURANCE COMPANY,
Defendant

STIPULATION AS TO EXHIBIT

The parties, as evidenced by the signature of their counsel hereto, stipulate as to the following described documents that such are true and accurate copies of the original, that copies may be used in lieu of the original, and that such may be admitted as an exhibit by either party. The parties do not stipulate as to the legal effect of any such exhibit, or as to the truth or falsity of any information contained within any such exhibit. The documents subject to this stipulation are as follows:

1. Sub-contract between Rush Engineers and J & S Construction Company, Inc.
2. Performance bond issued to the United States of America by The Home Insurance Company as surety for Rush Engineers as principal on the job in question in this lawsuit.
3. The payment bond issued to the United States of America by The Home Insurance Company as surety

for Rush Engineers as principal for the job in question in this lawsuit.

4. Power of Attorney from The Home Insurance Company pursuant to which the bonds listed as two and three above were issued.

5. The summons and complaint filed by J & S Construction Company against Rush Engineers in the Chancery Court for Jackson County, Tennessee.

6. Memorandum entered by this Court in the case of J & S Construction Company vs. Rush Engineers under date of December 12, 1978.

7. Judgment entered in the case of J & S Construction Company vs. Rush Engineers by this Court on December 14, 1978.

8. Order entitled "Order Granting Stay" entered in the case of J & S Construction Company vs. Rush Engineers, dated January 12, 1979.

9. Order entitled "Agreed Order Granting Reduction of Supersedeas Bond" in the case of J & S Construction Company vs. Rush dated January 16, 1979.

10. A bond filed by Rush on January 30, 1979, with Rush as principal and The Home Insurance Company as surety, and a copy of the Power of Attorney pursuant to which such was executed.

11. Copy of the docket sheet from the District Court Clerk's Office in the case of J & S Construction Company vs. Rush Engineers containing entries through March 8, 1979.

12. The opinion and mandate of the Sixth Circuit Court of Appeals in the case of J & S Construction Company vs. Rush, the mandate being dated December 22, 1980.

13. A bond execution report regarding said bond filed January 30, 1979.

14. Letter dated March 21, 1980 from Thomas J. Knight to The Home Insurance Company.

15. Letter dated April 3, 1980 from Albert E. Phillips to Harlan Dodson III.

16. Letter dated December 31, 1981 from Harlan Dodson to The Home Insurance Company.

17. Letter dated January 6, 1982 from George McCarthy, Jr. to Harlan Dodson.

18. Letter dated January 12, 1982 from Lynn M. Schubert to Harlan Dodson.

19. Letter dated February 1, 1982 from Harlan Dodson to Lynn M. Schubert.

20. Letter dated February 9, 1982 from Harlan Dodson to Lynn M. Schubert.

21. Letter dated January 19, 1979 from Harlan Dodson III to John Stites.

Harlan Dodson III
Lynn M. Schubert

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHEASTERN DISTRICT
OF TENNESSEE AT COOKEVILLE

No. 82-2082 Nov. 12, 1982
Cookeville, TN

IN THE MATTER OF:
J & S CONSTRUCTION CO., INC.
Plf.

vs.

THE HOME INSURANCE CO.
Def.

BEFORE: The Hon. L. Clure Morton, District Judge

FINDINGS OF THE COURT

THE COURT: The Court finds that this supersedeas bond was a supersedeas bond; that a scheme existed to attempt to deprive J & S Construction Company of the security they should have had; that Home Insurance Company knew about the outstanding liability through their branch office in Birmingham. I discount entirely the testimony of the man from the Home Insurance -- of Home Insurance Company. I don't believe it.

I find that the Home Insurance Company knew of the outstanding performance bond. I find the Home Office was well aware of the judgment against him.

I also find it is peculiar two cost bonds in this case were ever executed, and this cost bond was artfully drawn, it was artfully drawn to try to avoid the liability and to prevent -- to permit time to pass so that the plaintiffs could not recover on performance bond, and, therefore, I -- and I determine that the cost bond

--alleged cost bond is actually performance bond; that the terms and conditions of the order are incorporated therein; and judgment be entered against the defendant in the amount of the judgment, $106,000, plus cost and interest from the date of the original judgment at the regular rate provided by statute.

Mr. Dodson, you will incorporate all that in the memorandum and after you have done the memorandum, you will provide judgment by separate document.

And if I have omitted anything, I give you license to include anything I might have omitted as far as the scheme, artifice, and the method. This stinks.

Court is adjourned.

(Adjourned at 10:00 a.m.)

REPORTERS CERTIFICATE

I, Virginia K. Wells, Official Court Reporter for the United States District Court, Middle District of Tennessee, do certify that I recorded by stenograph and tape recorder proceedings had in the foregoing case in Cookeville, Tennessee, on November 12, 1982; that the transcript of excerpt therefrom is correct and complete to the best of my knowledge, skill and ability.

This is the 12th day of November, 1982.

Virginia K. Wells
Official Court Reporter

Filed Jan. 11, 1979

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

Case No. 78 2010 NE CV

J & S CONSTRUCTION COMPANY, INC.
Plaintiff

vs.

GEORGE R. RUSH, d/b/a
RUSH ENGINEERS
Defendant.

NOTICE OF APPEAL

Notice is hereby given that George R. Rush, d/b/a Rush Engineers, defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from judgment in the amount of $106,676.93 against George R. Rush, d/b/a Rush Engineers entered in this action on the 14th day of December, 1978.

GULLETT, STEELE, SANFORD & ROBINSON
By: J. Murray Milliken

230 Fourth Avenue North
Nashville, Tennessee 37219

Thomas J. Knight

P.O. Box 1086 Anniston, Alabama 36202
Attorneys for Defendant

We are surety for costs of this appeal not to exceed $250.00 dollars.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been mailed to Harlan Dodson, III, Esq., Dodson, Harris, Robinson & Aden, Attorney for Plaintiff, 900 Nashville City Bank Building, P.O. Box 2524, Nashville, Tennessee, on this the 11th day of January, 1979.

J. Murray Milliken